

November 29. 1770.

A N S W E R S
F O R

David Wemyss, eldest son of the deceased James Wemyss tenant in Cassingray, and of James, Alison, Isabel, Elisabeth, and Catharine Wemyss, the younger children of the said deceased James Wemyss,



T O

The PETITION of Elisabeth Tod, widow of the said deceased James Wemyss.

JAMES WEMYSS, tenant in Cassingray, now deceased, was married in 1730, to Elisabeth Tod, the petitioner, with whom he received 1000 merks of tocher; and by the contract of marriage entered into upon that occasion, the following provisions were made in favour of the wife, and the issue to be procreated between them.

“ The said James Wemyss binds and obliges him to have
“ in readiness, of his own proper means and money, the sum
“ of 2000 merks Scots money; which, with the sum of 1000
“ merks of tocher after mentioned, making together the sum
“ of 3000 merks, the said James Wemyss binds and obliges
“ him to ware, bestow, lay forth, and employ, in respon-
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“ fible mens hands, or upon well-holding lands, for annual-
 “ rents, and good security to be had therefor; and to take
 “ the rights and securities thereof to himself, and the said
 “ Elifabeth Tod, his spouse, and longest liver of them two,
 “ in conjunct fee and liferent, and the heirs and bairns law-
 “ fully to be procreated of the said marriage between them,
 “ in fee,” &c.

“ And whatever *lands, heritage, goods and gear*, shall hap-
 “ pen *to be conquested and acquired* during the marriage, the said
 “ James Wemyss binds and obliges him to provide and se-
 “ cure the same to himself in liferent, and the bairns lawfully
 “ to be procreate of the said marriage in fee; which failing,
 “ the said James Wemyss, his own nearest heirs, executors,
 “ and assignees.”

“ And it is hereby expressly stipulated and agreed to by
 “ both parties, That if it happens the said marriage to be
 “ dissolved by the decease of the said Elifabeth Tod, and that
 “ there be no children procreate and existing the time of the
 “ dissolution thereof; then, and in that case, the sum of 500
 “ merks of the foresaid 3000 merks to fall, appertain, and
 “ accresce, to the *nearest heirs, executors, and assignees, of the*
 “ *said Elifabeth Tod*; and the remainder of the said 3000
 “ merks to the said James Wemyss, his heirs, executors, and
 “ assignees.”

“ And in case it shall happen the said marriage to be dis-
 “ solved by the decease of the said James Wemyss, then, and in
 “ that case, the said James Wemyss is obliged, as by thir pre-
 “ sents he binds and obliges him, his heirs, &c. to content
 “ and pay to the said Elifabeth Tod, her heirs, executors, or
 “ assignees, the sum of 1000 merks Scots money; and that at
 “ and against the first term of Whitsunday or Martinmas next
 “ after the dissolution of the said marriage, with annualrent
 “ thereof during the not payment: And sicklike he obliges
 “ him, and his forebairs, to pay yearly to the said Elifabeth
 “ Tod, in case she survive him, as said is, such an annual-
 “ rent

“rent as by law shall correspond to the principal sum of
 “500 merks, beginning the first year’s payment thereof at
 “the first legal term next after the decease of the said
 “James Wemyfs, &c. All which provisions in her favour
 “are to subsist, whether there be bairns of the marriage or
 “not.”

“And in like manner, the said James Wemyfs hereby dis-
 “pones to his said promised spouse, in case she survive and
 “outlive him, allenary, an just and equal half of what
 “household-plenishing shall be in common betwixt them,
 “in case there be no children procreate and existing: But
 “if there happens to be children, ane or mae, he hereby re-
 “stricts her to an equal third of the haill.”

The foresaid provisions were extremely rational and suitable to the circumstances of the parties at the time, and were plainly intended to be in full of every thing; though, as the contract appears to have been wrote by an unskilful country-writer, the usual clause, declaring the same to be in full of all her legal claims, is omitted.

The contract bears to be entered into between the parties following, viz. “James Wemyfs tenant in Bogie, on the one
 “part, and Elisabeth Tod, lawful daughter to James Tod te-
 “nant in Gilston, with special advice and consent of her
 “said father, and the said James Tod, as taking full burden
 “in and upon him for his said daughter, on the other part,
 “in manner subsequent,” &c.—It was accordingly signed by James Wemyfs and James Tod; but the bride’s subscription does not appear at it.

James Wemyfs, having proved successful as a farmer, made a small purchase of land, which he settled upon his eldest son in fee; and he also, at his death, which happened in May 1766, left about L. 2000 Sterling in money and moveables, and a current tack of the farm of Cassingray, conceived to himself, “and his heirs and assignees, of no higher degree
 “than himself, and for whom he should be answerable.”

Having

Having died without any other settlement, the petitioner became very unreasonable in her demands; and likewise stirred up her younger children against the respondent. She, on the one hand, insisted, That as she had not signed the marriage-contract, she was not bound by it, but was at liberty to betake herself to her legal claims of *terce* and *jus relicte*: on the other hand, she made the younger children insist, That the contract was good *quoad* them; and that the whole subject, being conquest, they were all intitled to an equal share, as joint heirs of provision under the marriage-contract.

The respondent, the eldest son, naturally continued the possession of the farm, and of course had the interim custody and care of his effects; but he did every thing in his power to accommodate the petitioner, and his younger brothers and sisters, and to bring about a reasonable settlement with them. The petitioner still continued to live in family with him; and to appearance they seemed to be in good terms; but as she insisted to have the matter determined by law, a process was commenced in the name of her and the younger children, insisting in the contradictory conclusions above mentioned, viz. That the contract was null *quoad* the wife, and at the same time binding as to the interest of the younger children.

The respondent, on the other hand, contended, That the contract behoved either to be null *in totum*, or good *in totum*:
 Nov. 17 1768 upon which point the following interlocutor was, of this date, pronounced by your Lordships. "Find the contract of marriage betwixt James Wemyss and Elisabeth Tod, in respect
 "of the subsequent marriage betwixt them, subsisting and
 "obligatory upon all parties, viz. upon David Wemyss, upon the widow, and upon the younger children; and remit
 "to the Ordinary to proceed accordingly."

Jan. 17 1769. Thereafter the Lord Ordinary, of this date, "found, That
 "James Wemyss, the father, had a power of division; and
 "having

“ having exerced that power, by taking the fee of the lands
 “ of Lathallan, in favour of the defender, his son, the same
 “ does belong to him : Find, That the tack of the lands of
 “ Cassingray is divisible, and does belong to the pursuers, the
 “ younger children, equally.” As to the L. 2000 of money
 and moveables, it was not disputed that the children were in-
 titled thereto.

By the foresaid judgements, it was ascertained, in the *first*
 place, That the marriage-contract was binding upon all par-
 ties; 2do, That the younger children had a right, in terms
 of the contract, to every thing, except the land-estate, which
 was purchased by the father, and taken to the respondent
nominatim in fee; and the only remaining dispute is with the
 now petitioner, who insists, against her whole children,
 That she is intitled to her legal provision of third of move-
 ables, as well as to the conventional provisions in the mar-
 riage-contract, the same not having been expressly dis-
 charged.

Upon this point, the Lord Monboddo Ordinary, upon
 advising memorials, of this date, pronounced the following Mar. 2. 1769.
 interlocutor. “ Finds, That Elisabeth Tod not having dis-
 “ charged her *jus relicte*, is still intitled to the same, over and
 “ above the provisions in her contract of marriage; and that
 “ therefore she has right to a free third of the moveables,
 “ after deduction of a thousand merks, which she has right
 “ to by the contract; and of a third of the household plenish-
 “ ing, provided to her likewise by the contract of marriage;
 “ and decerns accordingly.”

And upon advising representation and answers, his Lord-
 ship, of this date, pronounced the following interlocutor. Mar. 2. 1770.
 “ The Lord Ordinary having considered this representation,
 “ with the answers, finds, That by the common law of Scot-
 “ land, as well as by the statute 1681, a wife is intitled to
 “ her *jus relicte*, unless she has discharged it, whatever other
 “ provisions might be made in her favour: Finds, That in

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“ such

“ such a case, it is not the business of a judge to divine, whether the discharge was omitted intentionally, or by inadvertency ; and that though in this case it may appear more rational, that the wife, in consideration of the particular provisions made both to herself and to her nearest of kin, should have discharged her *jus relicte*, it does not belong to the office of a judge, to supply such defects, and to make contracts for the parties that they have not made for themselves ; therefore refuses the desire of the representation, and adheres to his former interlocutor.”

Aug. 4. 1770. But upon advising a petition for the now respondent, with answers, your Lordships, of this date, pronounced the following interlocutor. “ The Lords having advised this petition, with the answers, find, That in this case Elisabeth Tod is not intitled to claim her *jus relicte* over and above the provisions in her contract of marriage ; and remit to the Ordinary to proceed accordingly.”

The petition now to be answered, reclaims against the fore-said interlocutor ; and although the petition is long and elaborate, it will be unnecessary to trouble your Lordships with a long argument, as the real merits of the question falls within a narrow compass.

In considering this case, the respondent will avoid entering into the question, Whether by the common law of Scotland, independent of the statute 1681, a conventional provision in a marriage-contract did bar the wife from claiming a terce out of her husband's lands ? It, with submission, appears to be founded in sound sense and reason, that a wife, independent of any statute, should not be allowed to claim both. It is a general rule of law, That *provisio hominis tollit provisionem legis*. The terce is that provision which the law hath given to the wife out of the estate of her husband, as a fund for her aliment and subsistence, in the event of his predecease ; and therefore, when the parties in a marriage-contract do stipulate a certain provision for the fore-said purpose, and

and what the bride and her friends do consider to be suitable to the rank and circumstances of the parties, it is scarce consistent with reason to suppose, that the contracting parties meant or understood, that the wife should be intitled, over and above the conventional provision, to claim a terce of her husband's estate. This indeed is clearly the language of the statute 1681. It seems to suppose, that it was owing to the ignorance or inadvertency of the writers of marriage-settlements, that the conventional provision was not declared to be in satisfaction of the legal provision of a terce; and it was to correct an undue advantage from being taken of husbands, contrary to the real meaning and intendment of the parties, at the time of entering into the contract, that the statute was made. And when that is the case, the respondents do, with submission, apprehend, that although the statute 1681 were to be considered as a correctory law, it ought not to be narrowed, but ought rather to receive an extensive and beneficial construction.

And if the foresaid statute is founded in sound sense and reason, and in the presumed will of the contracting parties in marriage-settlements, there seems, with submission, the same reason, why the law should have been extended to the *jus relicte*, as well as to the terce. The respondents will be pardoned to say, that it is a most whimsical reason that is assigned in the petition, why the statute was not extended to the *jus relicte*, viz. That the terce was a burden upon the estate of the husband: whereas the *jus relicte* was the proper estate of the wife. The distinction truly lies more in words than in reality. The *jus relicte* is in reality as much a burden upon the estate of the husband, as the terce: for although it is understood to be the wife's share of the goods in communion, yet in reality she has no right of property in his effects while he lives. He can spend every shilling of the funds out of which the *jus relicte* is claimable. The whole are affectable for his debts; and if he should convert the same into heritable

table subjects, whether lands or bonds, bearing interest, if a fraudulent intention cannot be alledged, the wife's claim will be totally frustrated: so that the only reason which can with any justice be assigned, why the statute 1681 was totally silent as to the *jus relicte*, seems to be this, That at that period it was not an object of the legislature's attention, and on that account had escaped their observation, as moveable estates were then of little value, consisting generally of nothing else than the household furniture, and perhaps some little stocking.

The respondents have mentioned these things to your Lordships, in order to shew, that claims of this kind are intitled to no degree of favour. They may be justly said, agreeable to the preamble of the statute 1681, to take their rise from the ignorance and inadvertency of writers, in not declaring the conventional provisions to be in full of all the wife's legal provisions; as it can scarce be doubted, that when, in a marriage-contract, a provision is stipulated for the wife's aliment and subsistence, in the event of her husband's predecease, that it was the intendment of parties, that it should be in full of all she could claim out of her husband's estate. But these general topics it is unnecessary to insist upon; because the respondents do, with submission, apprehend, that, upon a fair and a just construction of the marriage-contract in question, the petitioner's *jus relicte* is clearly cut off; and upon that ground it was, that the interlocutor reclaimed against was pronounced.

It is an established rule in law, That all contracts must be constructed according to what appears to have been the intendment of the contracting parties; and therefore, though in general it were admitted, that a wife may claim the *jus relicte* over and above her conventional provisions, where there is nothing in the marriage-contract from which the will of the contracting parties to the contrary can be gathered; yet where it appears from the contract itself, that the whole of
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the wife's legal claims, as well those affecting the real as the personal estate, were under view, and were meant to be satisfied by the provisions settled upon her, your Lordships surely would not think yourselves at liberty, contrary to the clear will of parties, to allow her to take, not only what was thus settled upon her, but likewise what the law would have given her, if nothing at all had been settled. It appears not only from the reason of the thing, but from various decisions of the court, that an implied or virtual discharge has as strong an effect, as a discharge conceived in the most explicit terms.

In the present case, it is impossible to doubt that the whole of the wife's legal claims were under the view of parties at the time. The contract not only stipulates a certain sum to be paid yearly to the wife during her life, which may be supposed to be in place of the yearly provision she would be intitled to out of her husband's heritage, but a farther sum is likewise made payable to her the next term after her husband's decease, which can bear no other construction than a liquidation of that uncertain claim which arises to a wife upon her husband's decease out of his moveables.

And it is extremely material to observe, that this contract not only stipulates certain provisions in favour of the wife, in the event of her survivance, but likewise gives a sum of money to her nearest in kin, in the event of her predecease. If the terce claimable by the wife out of her husband's heritage had only been in view, the whole provisions would naturally have been conceived in favour of the wife personally, and would have been adapted solely to the event of her outliving her husband; but when a sum is stipulated to her nearest of kin, in the event of her predecease, this can bear no other construction than that it was meant to come in place of that claim, which, from the communion of goods, arises to the wife's nearest of kin out of the moveables, when there is no special settlement.

It is plain from the foresaid clause, that both the wife's
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claim of terce, and her claim *jure relictae*, were under view, and were meant to be superseded by the conventional provision: and it was upon this principle that your Lordships, in the case of Margaret Crawford *contra* Hog, 6th January 1747, found the claim of the wife's nearest of kin barred upon her predecease, though nothing was stipulated in their favour, nor any discharge of the claim arising in that event; because certain provisions of conquest and moveables were stipulated to the wife in case she had survived, and which she accepted of in full of her claims in that event.

And in a still later case, viz. Mackinnon *contra* Macdonalds, in 1761, your Lordships refused the claim of the wife's nearest of kin, merely *ex præsumpta voluntate*, she having been provided, in case of her surviving, in an annuity during her life, and in a third of moveables, and half of the conquest; but without any clause discharging her legal claims, either in one event or another, or declaring her provisions to be in satisfaction of these claims.

It is said for the petitioner, That no more was intended by the foresaid clause stipulating 500 merks to the petitioner's nearest of kin, in the event of her predecease, than a return of the one half of the tocher to her nearest of kin; and that as this 500 merks was to be paid out of the 3000 merks which was settled upon the wife and children; so it was impossible to suppose, that a sum stipulated to be paid out of a subject that could not fall under the *jus relictae*, should bar the petitioner, or her nearest of kin's, right to the *jus relictae*: And as to the 1000 merks to be paid to the petitioner herself, it was said, that it was stipulating no more than a return of her whole tocher, in the event of her surviving her husband; and that this stipulation is clogged with no other quality or condition, than simply the petitioner's surviving her husband.

But the respondents will be pardoned to say, that this reasoning is altogether inconclusive and unsatisfactory. Where is the absurdity, in supposing that the wife's claim *jure relictae*,
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though affecting only her husband's funds, which are simply moveable, should be satisfied by a sum of money to be raised out of the husband's heritable estate? It happens in most cases, that the wife's claim *jure relicte*, as well as her claim of terce, are satisfied by a provision, secured by investment, upon her husband's lands; and the reason why the 500 merks was appointed to be paid out of the 3000 merks provided to the wife and her issue, appears to be none other than this, that (as shall afterwards be shown) the 3000 merks was all that the husband was then worth in the world.

The 500 merks is appointed to be paid out of the 3000 merks; and there is no more reason for calling it a return of part of the tocher, than a payment out of the husband's other funds. And supposing that it had expressly said, that in the foresaid event the half of the tocher must be paid to the petitioner's nearest in kin, it would not have affected the argument. For it cannot be presumed, that the husband was to return to the wife's nearest of kin the half of her tocher for no consideration whatever. It must be understood that there was to be a *quid pro quo*. It was a reasonable stipulation, upon the supposition of its being in satisfaction of the claim competent to her nearest in kin out of her husband's moveables; but it is impossible to suppose that it was the intention of parties, that, in the event of the petitioner's predecease without children, her nearest of kin should not only be intitled to claim the 500 merks, but likewise to carry off from the husband, in his own lifetime, the one half of all his moveables. Such a claim must, with submission, have appeared highly irrational, and contrary to the meaning of parties: and yet, without maintaining that claim, it is impossible to support the present; for if the legal provision of the *jus relicte* subsists in the one case, it must likewise subsist in the other; and as in the one case, the 500 merks must be understood in full of the claim of the nearest of kin, so the 1000
merks

merks must be understood to be in full of the claim competent to herself, in the event of her surviving her husband.

But what is decisive of the present question is, the clause above recited in the marriage-contract, whereby the whole conquest is secured in favour of the bairns of the marriage, without any burden whatever; and it would, with submission, be inconsistent to allow the petitioner's present claim for a share of this very conquest, which, with her own consent, was provided to her children, without any burden or limitation.

Your Lordships will remember the decision 17th June 1732, Stirling of Glorat *contra* Lukes, which is thus abridged in the Dictionary. “ In a contract of marriage, the conquest being
 “ provided to the heirs and bairns of the marriage, and the
 “ father having exercised his power of division, one of the
 “ daughters, to whom a small share was provided, insisted
 “ for her legitim, contending, it was not in her father's power
 “ to provide, even expressly, far less by implication, that
 “ his moveables should not be subjected to a claim of legitim. It was answered, That the legitim was cut off by the
 “ contract of marriage, providing the conquest to the bairns
 “ of the marriage; and when the moveables are once established on that footing, the father's power of division follows of course. This brought on the question, If the legitim could be set aside, even in a contract of marriage?
 “ The Lords found, That, by the provisions in the contract
 “ of marriage, and settlements made by the father, the pursuer was excluded from any claim of legitim; and the reasons were, a man who has no wife or children, may dispose upon his moveables without restraint; why not in a
 “ contract of marriage, as well as in any other deed? *2do*,
 “ The terms of the contract are the conditions upon which
 “ the marriage follows, and the children procreated upon
 “ these conditions: they are brought into existence, and they
 “ can

“ can claim no legal benefit by their existence, inconsistent
 “ with these conditions.”

The above decision is extremely applicable to this: for if the childrens claim of legitim was there cut off, because the conquest was provided to the heirs and bairns of the marriage, which conquest, from the nature of the thing, became subject to the father's power of distribution; by the same rule, the claim competent to the wife out of the husband's moveables, must, in like manner, be cut off in this case, when, with her own consent, the whole conquest was provided to the issue of the marriage.

The question, therefore, can admit of no doubt. There is clearly no room for any claim *jure relicte*. The 3000 merks, which was understood to be the full amount of all that the contracting parties were worth in the world at the time, was provided to himself and his wife in conjunct fee and liferent, and the heirs and bairns of the marriage in fee; and the whole conquest is provided, by the wife's consent, to the bairns of the marriage, without any burden whatsoever.

And whereas it was said, That the 3000 merks could not possibly be the amount of the husband's funds, as he was then in possession of a well-stocked farm; and as the 3000 merks contracted was to be placed out upon interest, either upon land or other good security, he could not possibly intend to displenish his farm, and dispose of his stock, to raise that sum. It is answered, That as all the subjects that were left by Mr Wemyss at his death, were acquired long posterior to the marriage, they must all be considered as falling under the clause of conquest, unless in so far as the petitioner could show, that the same were acquired by funds he was possessed of at the time of the marriage; whereas, not only is there no evidence of the fact, but the contrary is ascertained by evidence that is the most clear, and, in a question with the petitioner, the most unexceptionable of any that can be had, and that is the acknowledgement of the petitioner herself; and it must be ad-

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mitted, that no person now living had better access to know the extent of the funds they were possessed of at the time of the marriage, than herself. In the answers for the now petitioner, to the petition of the now respondents, of date 28th June 1770, there is the following passage. " When the respondent intermarried with James Wemyss, the petitioner's father, he was in very low circumstances: 3000 merks, including her tocher, was the outside of all he had in the world." Here is an explicit acknowledgement upon the part of the now petitioner, that the whole funds they were possessed of at entering into the marriage, were provided to herself and husband in liferent, and the heirs of the marriage in fee. James Wemyss was then but a young man, and his farm not considerable; and it is well known, that tenants and trading people do, at their marriage, generally contract all they are worth at the time; and though, by the words of the contract, they are taken bound to lend out the contracted sum upon land or other security, yet that is never insisted upon, as it might be hurtful to the parties themselves during the marriage: and therefore, as the whole conquest was, with her own consent, provided to the children of the marriage, without any burden; this, of itself, must be an absolute bar to any claim in virtue of her *jus relictae*.

And this being the case, it is altogether unnecessary to trouble your Lordships with any observations upon the many learned arguments and authorities stated in the petition, in order to show, that a conventional provision in favour of a wife does not seclude her from her *jus relictae*, unless that provision was granted and accepted of by her in satisfaction thereof. The respondents, in this case, have no occasion to maintain, that, anterior to the statute 1681, a conventional provision did debar the wife from the terce, and other legal provisions, though not so expressed; or that the *jus relictae* did fall under the spirit and intendment of the statute 1681. The respondent's plea is, That, upon a fair and just construction of

of the contract itself, the petitioner's *jus relictae* is in this case cut off by the consent and agreement of the contracting parties.

It is said in the petition, That if there had been no provision whatever made for the petitioner in this marriage-contract, it could not be maintained, that the provision of the conquest to the children of the marriage, would have frustrated the petitioner's right of terce in any lands purchased by the husband; and that, for the same reason, the provision of conquest, cannot deprive the petitioner of her *jus relictae*, unless it had been so expressed.

To this it is answered, That the case here put, it is believed, did never happen. The petitioner will find it difficult to point out any contract of marriage which did not contain some stipulation in favour of the wife. But if such a contract should exist, as the petitioner is here pleased to suppose, the respondents can see no reason why the stipulations of parties ought not to have full effect; and they apprehend, that, in the case supposed, the petitioner, by her own act and deed, would be deprived of her terce in the conquest lands.

The petitioner is pleased to say, that the plain meaning of your Lordships interlocutor now reclaimed against, is, that though the petitioner cannot take both her legal and conventional provisions, yet she may betake herself to the one or the other, as she finds most beneficial to her.

But it is, with submission, impossible that your Lordships interlocutor can bear any such construction; nor is any option thereby given to the petitioner. The first plea that was maintained by this petitioner, was, That as she had not signed the contract, she was intitled to repudiate the provisions therein stipulated, and to claim her terce out of the lands in the same manner as if there had been no marriage-contract. But your Lordships found, that the marriage-contract was binding upon all parties; which was finding, in other words, that she behoved to be satisfied with the provisions therein stipulated,

ted, and was not intitled to claim a terce out of her husband's lands. The respondents have endeavoured to show, and they hope to your Lordships satisfaction, that the petitioner, by this marriage-contract, was secluded from the *jus relicte* as much as from the terce; so that the contract must be equally binding upon her as to both. If she has an option to claim her *jus relicte*, she must likewise have an option to claim her terce; so that to give her such option now, would be to overturn an interlocutor of your Lordships, which has become final long ago, and cannot again be brought under review.

The petitioner has likewise thought proper to attack the justice of the aforesaid interlocutor, finding the contract binding upon all parties; but as that interlocutor has long ago become final, it would be improper to trouble your Lordships with saying any thing in support of it. The reasons of the judgement are obvious and apparent, and they are not only founded in law, but in sound sense and reason.

The petitioner, in order to create unfavourable impressions against the respondent David Wemyss, is pleased to say, that he is wallowing in riches, whilst she is left to starve; that the estate of Lathallan was purchased by the petitioner's husband at the price of L. 3000 Sterling; that he expended considerable sums in inclosing and improving it at the time of his death; that the lease of the lands of Cassingray, for which he paid a grassum of L. 500 Sterling, was, at his death, worth near L. 3000 Sterling; and that his personal funds would have amounted to L. 2000 Sterling.

But the circumstances of parties are here very much misrepresented. The fact is, that the yearly rent of Lathallan, when James Wemyss made the purchase, was only L. 66, 4s. Sterling, for which he paid L. 2317 Sterling; but he neither did, nor could, make the least improvement on the lands, as the purchase was made by him within two years of his death.

death. They were then set in tack at the foresaid rent, which tack is still current.

With respect to the tack of Cassingray, the grassum paid was only 6000 merks; and the sums expended by him were inconsiderable. All that he did was, the building some dry-stone dikes upon the limits of the farm; but no inclosures were perfected or divided before his death: but the respondent, David Wemyss, has, since his father's death, at a very great expence, laid out the grounds in proper inclosures; so that it is quite a mistake, that this tack would, at Mr Wemyss's death, have given any thing like L. 3000 Sterling.

As to the personal funds, the gross amount of them might be near to L. 2000; but of these sundry debts will not be recovered: and as he has already become bound to pay to some of his brothers and sisters, with whom he has settled matters, no less than L. 2600 Sterling, and others of them have still claims against him; so, after all burdens are cleared, his free funds will not be very considerable.

The accident of her husband's acquiring more substance than he was originally worth, can make no difference upon the merits of the present question. He might, in place of being successful in his business, have proved the reverse, and have left no greater funds than what were sufficient barely to answer her provisions. In which case, the law could not have compelled her to grant any indulgence to her children.

At the same time, from the behaviour of her children to her all along, and from the offers which her eldest son has made to her, merely to avoid a law-suit, she might have seen, that they do not mean, in settling with her, to confine themselves within the strict bounds of law. Much higher offers have been made to her, than she had the smallest title to expect; but her demands hitherto have been so exorbitant, that they could not possibly be complied with. At the same time, after all that has happened, the petitioner may rest assured, that she will meet with more than justice from her children.

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Upon the whole, It is humbly submitted to your Lordships, if the petitioner in this case is not barred from her legal claims, by the stipulations of the contract; and that as, by the contract, she is intitled to a conventional share of her husband's moveables, so she cannot, under pretence of her *jus relictæ*, claim another share of the same moveables. The plain and obvious meaning of the agreement is, that she should have a certain interest in the effects, in the different events therein specified, which interest is liquidated by the contract; that even her nearest of kin should have a specific share, in case she predeceased; that her children should have whatever the husband, by his industry, could acquire, without any burden in her favour, other than what was specially provided to her in the contract, which did clearly imply an agreement, that all legal claims should be extinguished.

In respect whereof, &c.

R O. MACQUEEN.

